IN THE
MISSOURI SUPREME COURT

No. SC84028

BEVERLY LINES,
Plaintiff/Appellant,

vs.

MERCANTILE BANK, N.A. f/k/a
MERCANTILE BANK OF
SOUTH CENTRAL MISSOURI,
Defendant/Respondent.

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNT, MISSOURI
31ST JUDICIAL CIRCUIT
The Honorable Calvin R. Holden

RESPONDENT'S SUBSTITUTE BRIEF

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This action involves a lawsuit instituted to recover statutory penal damages authorized by § 443.130, R.S.Mo., by reason of the alleged failure of mortgagee/ respondent to timely effect the release of a deed of trust during the settlement process of another lawsuit between appellant and respondent. Summary Judgment was entered for the mortgagee/respondent by the Circuit Court of Greene County, Missouri. An appeal to the Missouri Court of Appeals, Southern District followed. On September 26, 2001, the Southern District affirmed the judgment of the trial court by a vote of two to one. The Southern District denied transfer to this Court under Rule 83.02. Pursuant to Rule 83.04, this Court, upon application by Appellant, ordered the cause transferred to its jurisdiction on November 20, 2001.

This appeal is properly before the Supreme Court of the State of Missouri and within its appellate jurisdiction by reason of exercise of its authority granted under Missouri Supreme Court Rule 83.04.

STATEMENT OF FACTS

I. GENERAL BACKGROUND

This case arises out of litigation that was originally pending in Greene County, Missouri (hereinafter referred to as "the underlying case"). Plaintiffs filed a Petition for Declaratory Judgment in the underlying case in Greene County Circuit Court regarding Mercantile Bank's rights, duties and obligations in relation to various notes and security instruments executed in favor of Mercantile Bank. That lawsuit and all disputes incidental thereto were settled pursuant to the terms and conditions of the Settlement and Mutual Release Agreement. (L.F. 7-9).

The Lines Group, including Appellant, was represented by attorney Tom Millington in the underlying case. (L.F. 28). Mercantile Bank was represented by attorneys Frank Evans and Dan Wichmer. There were extended negotiations over the terms and conditions of the Settlement and Mutual Release Agreement . (L.F. 29). Attorney Tom Millington testified in his deposition that there were at least two prior drafts of the Settlement and Mutual Release Agreement. (L.F. 29, ¶ 3-6, L.F. 61, ¶ 3-6).

The Settlement and Mutual Release Agreement was signed by Laurence E. Lines, Beverly J. Lines, William Lines, Morton Lines, Martha Sue Lines and Lines Music Company, Inc. (collectively referred to therein as "the Lines Group") and was then forwarded back to Mr. Evans. Mr. Evans then forwarded the Settlement and Mutual Release Agreement to Thomas Fitzsimmons in Overland Park, Kansas, an employee of Firstar, Mercantile Bank's parent corporation, for his approval. (L.F. 38-39). Mr. Fitzsimmons forwarded it to David Rubin with Mercantile Bank's general counsel office in St. Louis. The Settlement and Mutual Release Agreement was received and signed in its present form by Mr. Evans on or about

December 13, 1999. (L.F. 40). On the date that Mr. Evans signed the agreement, the attorneys for Mercantile Bank filed with the Circuit Court in Greene County a Stipulation for Dismissal. (L.F. 40). On December 14, 1999, the trial court signed an order dismissing the underlying claims with prejudice. (L.F. 46). The Order of Dismissal was filed with the Circuit Clerk on December 21, 1999. (L.F. 46).

On December 3, 1999, Laurence Lines sent a demand letter to Mercantile Bank. (L.F. 12-13). The demand letter was not sent to any particular individual at Mercantile Bank and did not make any specific reference to a note or security instrument. (L.F. 12). This letter also did not make reference to any statute or request any action within any specified period of time. (L.F. 12). The letter concluded by stating that "[d]emand is hereby made for Mercantile to proceed appropriately to effect the release of the aforementioned deed of trust." (L.F.12).

Mercantile Bank delivered deeds of release on December 30, 1999, thirteen days after the trial court judge signed the order of dismissal in the underlying case and fourteen days after the stipulation was filed with the court. (L.F. 95). On December 28, 1999, plaintiff filed this lawsuit against Mercantile Bank seeking the statutory penalty provided in § 443.130. (L.F. 1-4).

Pursuant to Rule 84.04(c), respondent submits the following Résumé of Testimony:

II. RÉSUMÉ OF TESTIMONY

A. Tom Millington

Tom Millington was the attorney for the Lines Group in negotiating the Mutual Release and Settlement Agreement. (L.F. 28). Paragraph 10 of the Settlement and Mutual Release Agreement states that the Settlement and Mutual Release Agreement has been and shall be construed to have been prepared

by the Lines Group and Mercantile Bank so that the rules construing ambiguities against the drafter have no force and effect. (L.F. 28). Prior drafts of the Settlement and Mutual Release Agreement were exchanged between counsel for Mercantile Bank and the Lines Group prior to November 29, 1999. (L.F. 29). The language of the prior drafts was different. (L.F. 29). There were at least two preliminary drafts of the Settlement and Mutual Release Agreement. (L.F. 29).

The preliminary drafts of the Settlement and Mutual Release Agreement were changed because there were items which attorney Millington wanted included in the Settlement and Mutual Release Agreement on behalf of his clients, the Lines Group. (L.F. 29). The initial preliminary draft of the Settlement and Mutual Release Agreement had some language which Mr. Millington would not let his clients sign in that form and, therefore, Mr. Millington insisted that the language be changed in the preliminary Settlement and Mutual Release Agreement. (L.F. 29).

One of the changes that Mr. Millington insisted upon related to the release of the deed of trust. (L.F. 29). Mr. Millington wanted something in the Settlement and Mutual Release Agreement indicating that Mercantile Bank was going to release both deeds of trust. (L.F. 29).

Part of the consideration that Mercantile Bank was giving to the Lines Group pursuant to the Settlement and Mutual Release Agreement was a release of the deed of trust. (L.F. 30). Paragraph 5 was not included in the original draft of the Settlement and Mutual Release Agreement. (L.F. 30). Paragraph 5 was included in the final draft of the Settlement and Mutual Release Agreement after Tom Millington expressed his concern to the attorneys for Mercantile Bank that either an executed deed of release needed to be provided with the Settlement and Mutual Release Agreement or something in the Settlement and

Mutual Release Agreement needed to reflect that it was being provided or would be provided thereafter. (L.F. 30). Paragraph 5 of the Settlement and Mutual Release Agreement states that Mercantile Bank agrees that, upon request, it shall execute appropriate releases of any security instruments to the extent that such security instruments secure any of the obligations. (L.F. 30). There is no time limit stated in paragraph 5 regarding the length of time Mercantile Bank has to comply with the request to execute appropriate releases of any security instruments.(L.F. 30).

According to the attorney for the Lines Group, Mercantile Bank ultimately complied with all provisions of the Settlement and Mutual Release Agreement. (L.F. 30). Mercantile Bank is in full compliance with all the terms and provisions of the Settlement and Mutual Release Agreement . (L.F. 31). The release of the security instruments was one of the terms and conditions of the Settlement and Mutual Release (L.F. 31). It was the intent of the parties to the Settlement and Mutual Release Agreement to settle the underlying lawsuit and all of its disputes and claims related thereto. (L.F. 31). There were no prior or subsequent Settlement and Mutual Release Agreements. (L.F. 31). The Settlement and Mutual Release Agreement contains the entire agreement between the parties. (L.F. 31). The Settlement and Mutual Release Agreement constitutes the full and complete agreement between the Lines Group and Mercantile Bank in regard to the resolution of the underlying lawsuit. (L.F. 31). There were no other promises or modifications of the Settlement and Mutual Release Agreement. (L.F. 31).

Pursuant to the Settlement and Mutual Release Agreement, Mercantile Bank and the Lines Group each had an obligation to dismiss with prejudice all claims and counterclaims in the underlying lawsuit. A true and correct copy of the Settlement and Mutual Release Agreement is attached to plaintiffs' Petition as

Exhibit "C." (L.F. 31). Under the terms of the Settlement and Mutual Release Agreement, if the Lines Group never made a request for the release of the security instruments, Mercantile Bank would have no duty to issue a deed of release. (L.F. 32). The express intent of the Lines Group and Mercantile Bank in the Settlement and Mutual Release Agreement was to accept the consideration therein described in full satisfaction of the claims therein and thereby released. (L.F. 32). Paragraph 8 of the Settlement and Mutual Release Agreement states that it is the intent of the Lines Group and Mercantile Bank to accept the above-referenced consideration in full satisfaction of the claims therein and thereby released. (L.F. 32). The consideration referred to in paragraph 8 of the Settlement and Mutual Release Agreement was the dismissal of the pending suit against Mercantile Bank. (L.F. 32). There was no money exchanged at the time of the signing or execution of the Settlement and Mutual Release Agreement. (L.F. 32). The Settlement and Mutual Release Agreement contemplated future performances. (L.F. 32). One of the matters that was to be performed in the future after the execution of the Settlement and Mutual Release Agreement was that a deed of release was to be issued by Mercantile Bank if requested by the Lines Group. (L.F. 32).

The demand letters were drafted by attorney Tom Millington. (L.F. 33). Attorney Tom Millington told members of the Lines Group that the final Settlement and Mutual Release Agreement did not have a specific time deadline for Mercantile Bank to file a deed of release. (L.F. 33). The only reason that attorney Tom Millington did not request a modification of paragraph 5 of the Settlement and Mutual Release Agreement so that it would contain a specific time deadline was because he did not want to spend additional time in redrafting the Settlement and Mutual Release Agreement. (L.F. 33). There was nothing preventing

attorney Tom Millington from inserting a time deadline into paragraph 5 of the Settlement and Mutual Release Agreement. (L.F. 33).

Paragraph 5 of the Settlement and Mutual Release Agreement does not contain any type of penalty if the deeds of release are not sent within a reasonable amount of time. (L.F. 33). The deeds of release were part of the subject matter of the underlying litigation. (L.F. 33).

The demand letter was not sent to the attorneys representing Mercantile Bank. (L.F. 33). The demand letter was sent directly to Mercantile Bank. (L.F. 34). A copy of the demand letter was not sent to Mercantile Bank's attorneys. (L.F. 33). The reason that a copy of the demand letter was not sent to Mercantile Bank's attorneys was because attorney Tom Millington did not wish to jeopardize a potential claim that his clients were creating against Mercantile Bank. (L.F. 34). Attorney Tom Millington drafted the demand letter, had his clients sign this demand letter, and instructed his clients to send the demand letter to Mercantile Bank, even though Attorney Millington knew that Mercantile Bank was represented by counsel. (L.F. 33, 34, 36).

Mercantile Bank has tendered to attorney Tom Millington two official checks in the amount of $27.00. (L.F. 34). A deed of release has been filed on the Stone County and Greene County properties. (L.F. 34).

When attorney Tom Millington received the final draft of the Settlement and Mutual Release Agreement, it was in typewritten form and had no handwriting on it at all. (L.F. 34). The number "30" was written in by attorney Tom Millington on the first page of the Settlement and Mutual Release Agreement.

(L.F. 34). Not all of the members of the Lines Group signed the Settlement and Mutual Release Agreement on November 30, 1999. (L.F. 34).

On November 30, 1999, Thomas Fitzsimmons of Mercantile Bank had not signed the Settlement and Mutual Release Agreement. (L.F. 34).

On November 30, 1999, David Rubin of Mercantile Bank had not signed the Settlement and Mutual Release Agreement. (L.F. 35).

On November 30, 1999, Frank Evans had not signed the Settlement and Mutual Release Agreement. (L.F. 35).

On November 30, 1999, Dan Wichmer, an attorney for Mercantile Bank, had not signed the Settlement and Mutual Release Agreement. (L.F. 35).

The consideration for the issuance of the deeds of release by Mercantile Bank was the Settlement and Mutual Release Agreement. (L.F. 35).

B. Laurence Lines (Deceased)

Laurence Lines is a member of the "Lines Group". (L.F. 35). Paragraph 5 of the Settlement and Mutual Release Agreement does not contain a specific time deadline for the issuance of deeds of release. (L.F. 35). As a result of the filing of the deeds of release, plaintiffs have not been denied any financing by any lending institution. (L.F. 35). The demand letters were mailed by Laurence Lines. (L.F. 35). The demand letters were drafted by attorney Tom Millington. (L.F. 36). Attorney Tom Millington gave the demand letters to Laurence Lines and Beverly Lines to sign. (L.F. 36).

When Laurence Lines signed the Settlement and Mutual Release Agreement, it was not signed by any representative of Mercantile Bank. (L.F. 36). The demand letter does not reference any statute. (L.F. 36). The only signature that appears on the demand letter is Laurence Lines. (L.F. 36). The demand letter refers to the Settlement and Mutual Release Agreement but not any Missouri statute. (L.F. 36).

The Settlement and Mutual Release Agreement was enclosed with the demand letter. (L.F. 36). The demand letter did not request the issuance of a deed of release within any specific time. (L.F. 36). The demand letter only makes request upon Mercantile Bank to "proceed appropriately to effect release . . . of the deeds of trust." (L.F. 36).

Beverly Lines never signed a letter requesting a deed of release from Mercantile Bank. (L.F. 36). Beverly Lines' name is not mentioned anywhere in the body of the demand letter. (L.F. 36). The Stone County and Greene County properties were jointly owned by Laurence Lines and Beverly Lines at all times relevant hereto. (L.F. 37).

C. Beverly Lines

Beverly Lines never sent a demand letter to Mercantile Bank requesting a deed of release for either the Greene County or Stone County properties. (L.F. 37). Beverly Lines was an owner of the property in Stone County on December 3, 1999. (L.F. 37).

D. Frank M. Evans, III

Frank Evans is an attorney with the law firm of Lathrop & Gage in Springfield, Missouri. (L.F. 37). Before joining Lathrop & Gage and at all times relevant hereto, Frank Evans was the senior shareholder in Miller and Sanford, P.C. (L.F. 37). Miller and Sanford, P.C., represented Mercantile Bank in a lawsuit

filed by "the Lines Group," including Laurence E. Lines and Beverly J. Lines, in the Circuit Court of Greene County, Missouri, Case No. 199CC-1677. (L.F. 37).

On or about October 18, 1999, Thomas W. Millington, an attorney for the Lines Group, sent to Daniel R. Wichmer, a shareholder at Miller & Sanford, a written settlement demand regarding the above-referenced lawsuit. (L.F. 38). After October 18, 1999, Mr. Millington and Frank Evans entered into negotiations regarding settlement of the underlying lawsuit. (L.F. 38). Those negotiations included discussions concerning the specific terms of the proposed Settlement and Mutual Release Agreement. (L.F. 38). The language of that Agreement was revised at Mr. Millington's request on several occasions including certain limitations on the scope of the release to be given by the Lines Group to Mercantile Bank. (L.F. 38). During the negotiations, Mr. Evans specifically advised Mr. Millington that the final language of the revised agreement would have to be reviewed and approved by representatives of Mercantile Bank. (L.F. 38).

On Monday, November 29, 1999, a new version of the "Settlement and Mutual Release Agreement," which incorporated revisions requested by Mr. Millington, was delivered to Mr. Millington's office for his review. (L.F. 38). As of November 29, 1999, the agreement had not been signed by any representative of Mercantile Bank or its attorneys, nor had the revised language of the agreement been approved by Mercantile Bank. (L.F. 39). The following day, Tuesday, November 30, 1999, Mr. Millington delivered to Mr. Evans the "Settlement and Mutual Release Agreement," which had been executed by members of the Lines Group and Mr. Millington. (L.F. 39).

On Thursday, December 2, 1999, Frank Evans mailed the agreement to Thomas Fitzsimmons, Regional Division Head for Mercantile Bank in Overland Park, Kansas. (L.F. 39). In Mr. Evans' cover letter to Mr. Fitzsimmons, he explained the revised language and asked him to sign the agreement "[i]f the document is acceptable." (L.F. 39). The Agreement also required the approval and signature of David Rubin, Regional General Counsel for Mercantile Bank in St. Louis, Missouri, as well as Mr. Evans' and Mr. Wichmer's signatures as Mercantile Bank's attorneys. (L.F. 39).

Miller & Sanford never had authority to bind Mercantile Bank to the agreement without the specific approval of Mr. Fitzsimmons and Mr. Rubin of the revised agreement. (L.F. 39).

On Friday, December 3, 1999, Laurence E. Lines sent a letter by certified mail to Mercantile Bank in Springfield, Missouri, requesting that the bank "proceed appropriately" to release a deed of trust which secured a parcel of real property located in Greene County, Missouri. (L.F. 40). Neither Mr. Lines nor Mr. Millington provided Mr. Evans with a copy of that letter or otherwise gave anyone at Miller & Sanford any indication that such a letter had been sent. (L.F. 40).

On December 13, 1999, Mr. Evans received by mail the "Settlement and Mutual Release Agreement" that had been signed by representatives of Mercantile Bank. (L.F. 40). On that same day, Mr. Wichmer and Mr. Evans signed the agreement and sent it to Mr. Millington. (L.F. 40). Mr. Evans also filed a Stipulation for Dismissal of the above-described lawsuit pursuant to the terms of the agreement on that day. (L.F. 40).

E. Daniel R. Wichmer

Daniel R. Wichmer is a member of the law firm of Lathrop & Gage, practicing in the firm's Springfield, Missouri office. (L.F. 42). Before joining Lathrop & Gage, and at all times relevant to this matter, Mr. Wichmer was a shareholder in Miller & Sanford, P.C., located in Springfield, Missouri. (L.F. 42)

Certain members of "the Lines Group," including Laurence E. Lines and Beverly J. Lines, previously filed suit against Mercantile Bank, N.A., in the Circuit Court of Greene County, Missouri, Case No. 199CC-1677, seeking a declaratory judgment. (L.F. 42). The Miller & Sanford law firm defended Mercantile Bank in that action. (L.F. 42).

On October 18, 1999, Thomas W. Millington, an attorney for the Lines Group, sent to Mr. Wichmer, via facsimile, a written settlement demand regarding the above-referenced lawsuit. (L.F. 42). Mr. Wichmer was aware that after October 18, 1999, Mr. Millington and Frank M. Evans, III, another shareholder in Miller & Sanford were engaged in negotiations regarding the settlement of the above-referenced lawsuit. (L.F. 42). The Miller & Sanford law firm did not have authority to bind Mercantile Bank to the agreement. (L.F. 43). The agreement needed to be approved by Thomas Fitzsimmons, Regional Division Head for Mercantile Bank in Overland Park, Kansas, and David Rubin, Regional General Counsel for Mercantile Bank in St. Louis, Missouri. (L.F. 43). This aspect of Miller & Sanford's representation of Mercantile Bank, N.A., in this matter was repeatedly communicated to Mr. Millington in telephone conversations. (L.F. 43). Further, Mr. Wichmer also communicated this limitation to the trial judge in the underlying case on at least one occasion during arguments on various motions or objections to discovery made by both Mr. Millington and Mr. Wichmer. (L.F. 43).

Mr. Wichmer did not sign the "Settlement and Mutual Release Agreement" until December 13, 1999. (L.F. 43).

F. Michael Cherry

Michael Cherry is an Assistant Vice President for Firstar Corporation, the parent company of Mercantile Bank National Association ("Mercantile Bank"), in Springfield, Missouri. (L.F. 44). Mr. Cherry promptly advised the bank's attorney at the Miller & Sanford law firm about Mr. Lines' letter. (L.F. 45).

POINT RELIED ON

THE TRIAL COURT PROPERLY GRANTED DEFENDANT MERCANTILE BANK'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO MAKE A SUBMISSIBLE CLAIM UNDER § 443.130 IN THAT:

3. SECTION 443.130 IS PENAL IN NATURE AND THEREFORE MUST BE STRICTLY CONSTRUED;
4. SECTION 443.130 DOES NOT CONTROL THE RIGHTS, DUTIES, AND OBLIGATIONS OF AND BETWEEN THE APPELLANT AND MERCANTILE BANK;
5. THE APPELLANT FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT FULL SATISFACTION WAS MADE ON THE DEBT SECURED BY THE DEED OF TRUST AS REQUIRED BY § 443.130;
6. THE DEMAND LETTER WAS INSUFFICIENT TO INVOKE THE APPLICATION OF § 443.130 TO MERCANTILE BANK;
7. EVEN ASSUMING, *ARGUENDO*, THAT § 443.130 IS APPLICABLE AND THAT THE APPELLANT COMPLIED WITH ALL THE REQUIREMENTS OF THE STATUTE, MERCANTILE BANK FULFILLED ITS OBLIGATIONS UNDER § 443.130; AND
8. THE MUTUAL RELEASE AND SETTLEMENT AGREEMENT ENTERED INTO BY THE APPELLANT RELEASED ANY CLAIMS ARISING OUT OF OR RELATING

TO THE OBLIGATIONS OF MERCANTILE BANK AND THE APPELLANT INCLUDING ANY CLAIM UNDER § 443.130.

Clayton Plaza Intern. Leasing Co., Inc. v. Sommer, 817 S.W.2d 933 (Mo.App. E.D. 1991)

Ong Bldg. Corp. v. GMAC Mortg. Corp. of Pa., 851 S.W.2d 54 (Mo.App. W.D. 1993)

Roberts v. Rider, 924 S.W.2d 555 (Mo.App. S.D. 1996)

Section 443.060, R.S.Mo 2000

Section 443.130, R.S.Mo 2000

ARGUMENT

RESPONSE TO APPELLANT'S POINTS I AND II

THE TRIAL COURT PROPERLY GRANTED DEFENDANT MERCANTILE BANK'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO MAKE A SUBMISSIBLE CLAIM UNDER § 443.130 IN THAT:

1. SECTION 443.130 IS PENAL IN NATURE AND THEREFORE MUST BE STRICTLY CONSTRUED;
2. SECTION 443.130 DOES NOT CONTROL THE RIGHTS, DUTIES, AND OBLIGATIONS OF AND BETWEEN THE APPELLANT AND MERCANTILE BANK;
3. THE APPELLANT FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT FULL SATISFACTION WAS MADE ON THE DEBT SECURED BY THE DEED OF TRUST AS REQUIRED BY § 443.130;
4. THE DEMAND LETTER WAS INSUFFICIENT TO INVOKE THE APPLICATION OF § 443.130 TO MERCANTILE BANK;
5. EVEN ASSUMING, *ARGUENDO*, THAT § 443.130 IS APPLICABLE AND THAT THE APPELLANT COMPLIED WITH ALL THE REQUIREMENTS OF THE STATUTE, MERCANTILE BANK FULFILLED ITS OBLIGATIONS UNDER § 443.130; AND

6. THE MUTUAL RELEASE AND SETTLEMENT AGREEMENT ENTERED INTO BY THE APPELLANT RELEASED ANY CLAIMS ARISING OUT OF OR RELATING TO THE OBLIGATIONS OF MERCANTILE BANK AND THE APPELLANT INCLUDING ANY CLAIM UNDER § 443.130.

STANDARD OF REVIEW

Beverly Lines appealed the order of the trial court granting summary judgment in favor of Defendant Mercantile Bank to the Missouri Court of Appeals, Southern District. The Southern District affirmed the judgment of the trial court by a vote of two to one. The Southern District denied transfer to this Court. Upon application by the Appellant, the Supreme Court ordered the cause transferred to its jurisdiction. The Supreme Court reviews all causes coming to it from the court of appeals, whether by certification, transfer, or certiorari, the same as on original appeal. Mo. Const. art. V, § 10.

Appellate courts review the grant of summary judgment de novo. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The record from an appeal of a summary judgment is reviewed in the light most favorable to the party against whom judgment was entered, and the non-moving party is granted the benefit of all reasonable inferences from the record. Id. Summary judgment will be upheld on appeal if the movant is entitled to judgment as a matter of law and no genuine issues of material fact exist. Id. at 377. Summary judgment is designed to permit the trial court to enter judgment, based on the law, where the moving party shows undisputed facts. Id.; Missouri Supreme Court Rule 74.04. Facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. Id. at 376.

Only genuine disputes as to material facts preclude summary judgment. Id. A material fact in the context of summary judgment is one from which the right to judgment flows. Id.

A defending party, such as Mercantile Bank, can establish a right to summary judgment by demonstrating any of the following: 1) facts that negate anyone of the claimant's elements facts; 2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements; or 3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense. Id. Each of the above-numbered methods individually establishes a right to judgment as a matter of law. Id. at 381. Thus, where the facts underlying the right to judgment as a matter of law are beyond dispute, summary judgment is proper. Id. Finally, if, as a matter of law, the judgment of the trial court is sustainable on any theory, even one entirely different than that posited at trial, it should be sustained on appeal. Id. at 387-88.

In this case, Appellant does not dispute the material facts, but disagrees on the proper application of § 443.130 to the facts of this matter. Where the underlying facts are not in question, disputes arising from the proper application of the law are certainly a matter of law for the Court's determination.

1. SECTION 443.130 IS PENAL IN NATURE AND THEREFORE MUST BE STRICTLY CONSTRUED

This appeal arises out of an action commenced by a mortgagor, Beverly Lines, against her mortgagee, Mercantile Bank, for Mercantile Bank's alleged failure to acknowledge satisfaction and provide Ms. Lines with a deed of release. Section 443.060.1 requires a mortgagee, when it has received "full

satisfaction of any security instrument, ... at the request and cost of the person making the same, [to] deliver to such person a sufficient deed of release of the security instrument." Section 443.130 is an enforcement mechanism for § 443.060. Section 443.130 states:

> If [a mortgagee] . . . receiving satisfaction, does not, within fifteen days after request and tender of costs . . . deliver to the person making satisfaction a sufficient deed of release, such person shall forfeit to the party aggrieved ten percent upon the amount of the security instrument, absolutely, and any other damages such person may be able to prove such person has sustained, to be recovered in any court of competent jurisdiction.

The purpose of § 443.130 is to "enforce the duty of the mortgagee to clear the title of the mortgagor, so that it [is] apparent upon examination that the encumbrance of record no longer exist[s]." Ong Building Corp. v. GMAC Mortg. Corp. of Pennsylvania, 851 S.W.2d 54, 55 (Mo.App. W.D. 1993). The statute provides for an absolute penalty of ten percent of the mortgage if a mortgagee fails to deliver a deed of release after satisfaction of a mortgage, a demand to the mortgagee for the release, and tender of costs. Murray v. Fleet Mortg. Corp., 936 S.W.2d 212, 215 (Mo.App. E.D. 1996).

Statutes imposing penalties of this nature are strictly construed. Id. In fact, Missouri courts have long recognized the penal nature of § 443.130 and its predecessors. See Roberts v. Rider, 924 S.W.2d 555, 559 (Mo.App. S.D. 1996); Ringstreet Northcrest, Inc. v. Bisanz, 950 S.W.2d 520, 522 (Mo.App. W.D. 1997); Murray v. Fleet Mortg. Corp., 936 S.W.2d 212, 215 (Mo.App. E.D. 1996); Trovillion v. Chemical Bank, 916 S.W.2d 863, 865 (Mo.App. E.D. 1996); Masterson v. Roosevelt Bank, 919 S.W.2d 9, 11 (Mo.App. E.D. 1996); Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822, 823 (Mo.App.

E.D. 1995); Ong Bldg. Corp. v. GMAC Mortg. Corp. of Pennsylvania, 851 S.W.2d 54, 55 (Mo.App. W.D. 1993). When the basis of an action is a statute which is highly penal, such as § 443.130, the statute must not only be strictly construed, but must be applied only to such cases as come clearly within its provisions and manifest intent. Roberts, 924 S.W.2d at 560.

Appellant argues that the existing Missouri case law holding that § 443.130 is penal in nature is plainly erroneous and must be overruled. Appellant contends that a statute is not penal in nature merely because it calls for the assessment of a penalty. In support, Appellant asserts that penal laws refer to criminal laws only and do not include statutes imposing penalties for civil violations. Accordingly, Appellant argues that § 443.130 is remedial and should be liberally construed.

Appellant primarily relies upon Tabor v. Ford, 240 S.W.2d 737 (Mo.App. 1951) for support for her contention that the statute is remedial rather than penal in nature. Appellant quotes the Tabor opinion at length and cites numerous United States Supreme Court cases as authority and instruction in determining whether a statute is penal or remedial in nature. The Missouri courts, rather than the United States Supreme Court, however, are the final authority on determining which of its statutes are penal and which are remedial in nature. The Missouri Supreme Court has expressly refused to accept the proposition that a penal law refers to criminal laws only and does not include penalties imposed for civil violations. Mo. Gaming Comm'n v. Mo. Veterans' Comm'n, 951 S.W.2d 611, 613 (Mo. banc 1997). As previously stated, numerous cases have recognized that § 443.130 is nothing but penal in nature. See cases cited, supra.

Appellant additionally argues that these decisions finding that § 443.130 is penal in nature are inconsistent with § 1.010 of the Missouri Revised Statutes. Appellant, however, attempts an interpretational

sleight of hand by quoting only the middle of the statute. (See Appellate Substitute Brief, page 23). This statute, in its entirety, reads as follows:

> The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws enforced for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.

It is well settled in Missouri law that the reference to common law in § 1.010 refers to the British common law. State ex rel. Kansas City Stockyards Co. of Me. v. Clark, 536 S.W.2d 142, 151-152 (Mo. banc 1976); In re: Interim Report of Grand Jury for March Term of Judicial Circuit of Missouri, 553 S.W.2d 479, 480 (Mo. banc 1977). Clearly, § 1.010 is intended to prevent the supremacy of the common law of England over any act of the general assembly or decisions of the Missouri courts. It does not invalidate the decisions reached in Missouri appellate court cases which have repeatedly held that § 443.130 is a penal statute that must be strictly construed. Appellant's claim to the contrary is ludicrous, without merit, and utterly frivolous.

The absurdity of Appellant's argument is further illustrated by the effect that this Court's adoption of Appellant's position would have on the laws of the State of Missouri. Essentially, Appellant is stating that

§ 1.010 mandates that **all** civil statutes must be interpreted liberally. Accordingly, Appellant asks this Court to adopt a rule of construction which would effectively overrule every case that applies a strict construction standard to any statute in the State of Missouri in a civil case. This argument is clearly erroneous.

Missouri case law is quite clear that not all statutes are to be interpreted liberally. The Missouri Supreme Court has specifically held that penal statutes are to be strictly construed. Longstanding Missouri case law has specifically held that § 443.130 is a penal statute. See cases cited, supra. Accordingly, because § 443.130 is penal in nature, it must be strictly construed and applied only to such cases as come clearly within its provisions and manifest intent. See Roberts, 924 S.W.2d at 560. As explained below, the present case does not fall within the provisions of § 443.130 and its manifest intent. The trial court was, therefore, correct in granting summary judgment in favor of Mercantile Bank and against Appellant.

2. SECTION 443.130 DOES NOT CONTROL THE RIGHTS, DUTIES, AND OBLIGATIONS OF AND BETWEEN THE APPELLANT AND MERCANTILE BANK

Given a strict construction, section 443.130 is not applicable to the facts and circumstances of the present case. Section 443.130 expressly governs situations where an individual satisfies a secured debt with "good funds." That is, Section 443.130 specifically states that it applies to situations where the holder of a deed of trust "receive[s] satisfaction" but fails to deliver a deed of release to "the person making satisfaction . . . ." Section 2 of the statute further states that a demand made pursuant to § 443.130 must "include good and sufficient evidence that the debt secured by the deed of trust was satisfied with **good funds**." (Emphasis added).

The scope of § 443.130 is limited to situations where a grantor of a deed of trust pays off a security instrument. This statute plainly does not contemplate a situation like the present where the satisfaction arises out of a settlement agreement and the consideration given for the satisfaction and deed of release is a release of all claims pending in the lawsuit, including the dismissal of that lawsuit.

The parties in the present suit entered into a Mutual Release and Settlement Agreement to resolve disputes in the underlying action. Pursuant to that settlement agreement, Mercantile Bank agreed to forbear any further efforts to collect on the deficiency of Appellant's obligations which were owed to Mercantile Bank. At no time during the settlement did any money change hands. (L.F. 32, ¶¶ 27-31; L.F. 63, ¶¶ 27-31). Accordingly, because the debt was not "satisfied with good funds," § 443.130 is not applicable to the present situation. Appellant's statutory claim must, therefore, fail as a matter of law, and the trial court's grant of summary judgment must be affirmed.

3. THE APPELLANT FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT FULL SATISFACTION WAS MADE ON THE DEBT SECURED BY THE DEED OF TRUST AS REQUIRED BY § 443.130

Under § 443.130 no obligation exists on the part of Mercantile Bank to deliver a deed of release to Appellant **until** Mercantile Bank has received full satisfaction of a secured debt. § 443.130, R.S.Mo. 2000. Specifically, § 443.130.1 states, in pertinent part, that a mortgagee is only subject to a statutory penalty if it fails to deliver a deed of release when requested after "thus receiving satisfaction." § 443.130.1, R.S.Mo. 2000. Section 443.130.2 further requires that a demand letter invoking the penalty contained in § 443.130.1 "include good and sufficient evidence that the debt secured by the deed of trust was satisfied

with good funds." § 443.130.2, R.S.Mo. 2000. In short, §§ 443.060 and 443.130 speak in terms of an antecedent requirement that a mortgagee receive "full satisfaction" prior to delivering a deed of release, and that any demand letter requesting a release pursuant to these sections must contain substantial evidence of such satisfaction. Roberts v. Rider, 924 S.W.2d 555, 559 (Mo.App. 1996).

In the present case, the only evidence included in the demand letter suggesting that full satisfaction was made on the deed of trust was a copy of the Settlement and Mutual Release Agreement referenced in and attached to the demand letter. This Settlement and Mutual Release Agreement did not present good and sufficient evidence that the debt had been fully satisfied. First, the Settlement and Mutual Release Agreement was only partially executed. The copy of the Settlement and Mutual Release Agreement attached to the demand letter was only signed by Appellant, other members of the Lines Group, and Appellant's attorney. The agreement, when presented with the demand letter, did not contain the signatures of any representatives from Mercantile Bank, its agents, or attorneys. In fact, the agreement was not fully executed by Mercantile Bank and its attorneys until December 13, 1999, ten days after Appellant's demand letter was received by Mercantile Bank.

Accordingly, it was not until Mercantile Bank, its representatives and attorneys, signed the Settlement and Mutual Release Agreement that the agreement had the effect of releasing the indebtedness of Appellant. Appellant's signatures on the agreement did not have the effect of satisfying its own obligations, but rather demonstrated Appellant's assent to release any claims against Mercantile Bank in exchange for the bank's release of Appellant's obligations. Thus, the Settlement and Mutual Release Agreement

presented with the demand letter did not provide sufficient evidence that full satisfaction was made on the debt secured by the deed of trust as required by § 443.130.

Second, one of the provisions of the Mutual Release and Settlement Agreement, and also part of the consideration for the deed of release, was that the Lines Group dismiss with prejudice all claims and counterclaims pending in the underlying action. The mere attachment of the Settlement and Mutual Release Agreement to the demand letter did not present sufficient evidence that the secured debt had been fully satisfied. In fact, Appellant's obligation to dismiss the underlying action was not satisfied at the time the demand letter was sent to Mercantile Bank. It was not until the obligations created in the agreement were fulfilled that full satisfaction of the debt had been made. Thus, Mercantile Bank's duty to deliver a deed of release did not arise until Appellant had fulfilled her obligation to dismiss the underlying suit. Therefore, full satisfaction of the obligations created by the Settlement and Mutual Release Agreement did not occur until the Stipulation for Dismissal was filed and the underlying case was dismissed.

The Stipulation for Dismissal was filed on December 13, 1999. The trial court signed an Order of Dismissal on December 14, 1999. The Order of Dismissal was filed with the clerk's office in the Circuit Court of Greene County, Missouri, on December 21, 1999. All three dates (December 13, 14, and 21, 1999) were at least ten days after the demand letter was sent. Accordingly, the demand letter sent by Appellant could not, and in fact did not, contain good and sufficient evidence that full satisfaction was made on the debt secured by the Deed of Trust as required by § 443.130. The trial court was, therefore, correct in granting summary judgment in favor of Mercantile Bank and against Appellant.

4. THE DEMAND LETTER SENT WAS INSUFFICIENT TO INVOKE THE APPLICATION OF § 443.130 TO MERCANTILE BANK

This action was brought by Appellant, Beverly Lines, for the recovery of a ten percent penalty for Mercantile Bank's alleged failure to provide Appellant with a deed of release within fifteen business days after a request was made pursuant to § 443.130. Section 443.130.2 provides the requirements that must be met to qualify for recovery of the statutory penalty. Section 443.130.2 provides that:

> To qualify under this section, the **mortgagor shall provide the request** in the form of a demand letter to the mortgagee. . . by certified mail, return receipt requested. The letter shall include good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds, and the expenses of filing and recording the release was advanced.

§ 443.130.2, R.S.Mo. 2000 (emphasis added).

The plain language of the statute requires that the mortgagor make a request for a deed of release to the mortgagee in the form of a demand letter.[1] Accordingly, to qualify for recovery under the statute, Appellant was required to request a deed of release from Mercantile Bank.

Appellant did not make a demand on Mercantile Bank, under § 443.130 for the release of a deed of trust. The demand letter sent to Mercantile Bank was never signed by Appellant, nor is there anything in the text of the letter which in anyway indicates that any demand was made by Appellant to Mercantile Bank for the issuance of a deed of release. On this fact alone, Appellant's claim under § 443.130 must fail.

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[1]The demand letter was prepared by Attorney Tom Millington. Attorney Millington instructed his clients to send the demand letter directly to Mercantile even though he knew that Mercantile was represented by counsel. The comments to Rule 4-4.2 (Communications with Person Represented by counsel) states that "parties to a matter may communicate with each other . . . ." The Rule and the comments address the ethics of a lawyer preparing a communication for his client 's signature which is to be sent on an ex parte basis to a party represented by counsel.

The trial court was, therefore, correct in granting summary judgment in favor of Mercantile Bank and against Appellant.

Additionally, the demand letter sent to Mercantile Bank was not a demand letter made pursuant to § 443.130. First, the demand letter makes absolutely no reference to § 443.130. There is nothing in the text of the letter which can in anyway put Mercantile Bank on proper notice that a statutory demand for a deed of release is being made. The letter does not request a deed of release within "fifteen business days," as required under the statute. To the contrary, the letter merely demands that "Mercantile . . . proceed appropriately to effect release of the aforementioned deed of trust."

The demand letter in this case stated that the debt that the deed of trust secured had been satisfied "[b]y the terms of the 'Settlement and Mutual Release Agreement.'" A copy of the settlement agreement was enclosed for Mercantile Bank's "reference." Thus, the **only** reference contained in the demand letter is the Settlement and Mutual Release Agreement which specifically addresses the release of security instruments. The Settlement and Mutual Release Agreement expressly provides at paragraph 5 that:

> Mercantile agrees that, upon request, it shall execute appropriately releases of any security instrument to the extent that such security instrument secure any of the obligations.

The reference and enclosure of the Settlement and Mutual Release Agreement incorporated the terms of such agreement into the request made by Appellant that Mercantile Bank "effect release of the . . . deed of trust." Accordingly, the demand letter's request that Mercantile Bank proceed **appropriately** to effect a release of the deed of trust did not invoke the penalty permitted under § 443.130.1. Instead, the demand letter and the incorporated settlement agreement required execution of appropriate releases of

security instruments for debts the terms of the agreement deemed to have been satisfied. The demand letter requested nothing more than compliance with the Settlement and Mutual Release Agreement. Mercantile Bank fully complied with the terms of the Settlement and Mutual Release Agreement. In fact, Appellant's attorney has admitted that Mercantile Bank has fully complied with the terms of the Settlement and Mutual Release Agreement. (L.F. 30-31). Thus, because Mercantile Bank complied with the requirements of the Settlement and Mutual Release Agreement, and the demand letter did not invoke § 443.130.1, the trial court properly granted summary judgment in favor of Mercantile Bank and against Appellant. Accordingly, the judgment of the trial court should be affirmed.

5. EVEN ASSUMING, *ARGUENDO*, THAT § 443.130 IS APPLICABLE AND THAT THE APPELLANT COMPLIED WITH ALL THE REQUIREMENTS OF THE STATUTE, MERCANTILE BANK FULFILLED ITS OBLIGATIONS UNDER § 443.130

Section 443.130 is an enforcement mechanism and provides a penalty for the failure to comply with the requirement of § 443.060. Ong Building Corp. v. GMAC Mortg. Corp. of Pennsylvania, 851 S.W.2d 54, 55 (Mo.App. W.D. 1993). Section 443.060 requires that:

> If [a] mortgagee . . . receive[s] full satisfaction of any security instrument, he shall, at the request and cost of the person making the same, deliver to such person a sufficient deed of release of the security instrument.

The plain language of this statute only requires a mortgagee to provide a mortgagor with a deed of release **after** the mortgagor "receive[s] full satisfaction." Mercantile Bank had no duty to effect a deed of release until Mercantile Bank received full satisfaction of the secured debt. Full satisfaction of the secured

debt did not occur until Appellant fulfilled all the terms of the Settlement and Mutual Release Agreement. The terms of the Settlement and Mutual Release Agreement required Appellant to "dismiss with prejudice all claims and counterclaims pending in the lawsuit." Appellant's claims in the underlying suit were not dismissed until either December 13, 1999, when the Stipulation of Dismissal was filed with the trial court, December 14, 1999, when the Order of Dismissal was signed by the trial court judge, or December 21, 1999, when the trial court's Order of Dismissal was filed with the Circuit Court of Greene County's clerk's office.[2]

Appellant argues that the commitment for dismissal with prejudice made prior to November 30, 1999, and documented on November 30, 1999, was sufficient to satisfy the requirement of the Settlement and Mutual Release Agreement. The Agreement, however, required that Appellant "dismiss with prejudice all claims and counterclaims pending in the lawsuit," rather than the mere execution of a Stipulation for Dismissal.

Certainly, if the intent of the parties was to simply require Appellant to execute a Stipulation for Dismissal, the terms of the agreement could have easily been written to express this intent. The plain

[2]Any of these dates can be used without altering the result and time computation because all three dates are within fifteen business day of December 30, 1999, the date Mercantile Bank delivered the deeds of release.

language of the agreement, however, expresses an intent to the contrary. The agreement expressly requires Appellant to "dismiss with prejudice all claims and counterclaims pending in the lawsuit." The claims pending in the lawsuit were not dismissed until, as previously stated, either December 13, 1999, when the Stipulation of Dismissal was filed with the trial court, December 14, 1999, when the Order of Dismissal was signed by the trial court judge, or December 21, 1999, when the court's Order of Dismissal was filed with the clerk's office.

Accordingly, Mercantile Bank did not receive full satisfaction until December 13, 1999, at the very earliest.[3] Therefore, Mercantile Bank's duty to effect a deed of release did not arise until, at the earliest, December 13, 1999. Mercantile Bank delivered to Appellant a deed of release on December 30, 1999, less than fifteen days from the date of full satisfaction. Mercantile Bank, therefore, fulfilled its obligations under § 443.130. The trial court was thus correct in granting summary judgment in favor of Mercantile Bank and against Appellant.

6. THE MUTUAL RELEASE AND SETTLEMENT AGREEMENT ENTERED INTO BY THE APPELLANT RELEASED ANY CLAIMS ARISING OUT OF OR RELATING TO THE

[3] Certainly an argument exists that the dismissal, and thus full satisfaction, occurred when the Order of Dismissal was signed by the trial court judge (on December 14, 1999) or when the court's Order of Dismissal was filed with the clerk's office (on December 21, 1999), but in any event all three dates, December 13, 14, and 21, are within fifteen business days of December 30, 1999, the date the deed of release was filed.

OBLIGATIONS OF MERCANTILE BANK AND THE APPELLANT INCLUDING ANY CLAIM UNDER § 443.130

A settlement agreement is a compromise by each party to the agreement of certain rights in order to gain what it did not have an established right to claim. State ex rel. Mo. Cable Telecomm. Ass'n. v. Mo. Pub. Serv. Comm'n, 929 S.W.2d 768, 773 (Mo.App. W.D. 1996)(citing Blacks Law Dictionary 67, 1372 (6th ed. 1990)(definitions of "agreement" and "settlement")). In the present case, Appellant compromised her right to pursue any claims related to the facts and matters in the underlying action by virtue of a release contained in the settlement agreement.

Releases contained in settlement agreements come in two forms, either specific or general. A general release disposes of the whole subject matter or cause of action involved. Clayton Plaza Intern. Leasing Co., Inc. v. Sommer, 817 S.W.2d 933, 936 (Mo.App. E.D. 1991). Generally, language contained in a general release not only releases the other party to the agreement, but also "'all other persons, firms or corporations' . . . or 'all claims of every nature and kind whatsoever arising out of the accident.'" Id. at 936. Additionally, terms such as "release and forever discharge" and "any and all claims, causes of action, and liability of any sort whatsoever" are often terms found in general, not specific, release agreements. Id. Blackstock v. Kohn, 994 S.W.2d 947, 954 (Mo. banc 1999). The inclusion of such language makes clear the intent of the signees to release all claims involved in the litigation. Clayton, 817 S.W.2d at 936.

Applying these characteristics to the terms of the Settlement and Mutual Release Agreement in the present case, it is clear that the intent of the parties to the agreement was to enter into a general release. Specifically, the Settlement and Mutual Release Agreement states:

> [T]he Lines Group [including Appellant] and Mercantile Bank each wish to settle the lawsuit and all other disputes and claims related thereto.

The release provisions of the agreement further provide that:

> The Lines Group [including Appellant], on behalf of themselves, their successors and assigns, and any other person claiming through them hereby release, acquit and forever discharge Mercantile, its agents, employees, servants, subsidiaries, officers, directors, successors and assigns of and from all liability, claims, damages, demands, lawsuits, causes of action, **whether known or unknown and whether accrued or accruing which the Lines Group ever had, now have, or might have hereafter on account of:**
>
> (a) the facts and matters set out in the Plaintiffs' Petition pending in the lawsuit;
>
> (b) the terms, application, approval, distribution, prepaying, guarantee, execution, collection, or foreclosure on any of the obligations or security pledge on the obligation;
>
> (c) any other fact or matter between the Lines Group [including Appellant] and Mercantile prior to the date of execution of this agreement.

(Emphasis added).

This language found in the Settlement and Mutual Release Agreement demonstrates the intent of Appellant and Mercantile Bank to enter into a general release. The agreement expresses an intent to "settle the lawsuit and all of the disputes and claims related thereto." Additionally, the agreement uses terms "on behalf of themselves, their successors and assigns, and any other person claiming through them" and "hereby

release, acquit and forever discharge Mercantile," further indicating the clear intent of Appellant to enter into a general release.

General releases, including the release in the present case, disposes of the entire subject matter relating to the dispute. The underlying dispute that gave rise to the settlement agreement arose out of particular obligations owed by Appellant to Mercantile Bank. Paragraph 5 of the agreement states:

> Mercantile agrees that, upon request, it shall execute appropriate releases of any security instruments to the extent that such security instruments secure any of the Obligations.

(L.F. 8). Certainly, one of the claims related to the dispute and the settlement of the matter was the issuance of a deed of release on the encumbered property. Accordingly, because Appellant released all claims relating to the underlying dispute, "whether known or unknown, and whether accrued or accruing," Appellant released any potential claim under § 443.130. The trial court was, therefore, correct in granting summary judgment in favor of Mercantile Bank and against Appellant.

CONCLUSION

Wherefore, for the foregoing reasons, Respondent prays for an order of this Supreme Court affirming the decision of the trial court granting summary judgment in favor of Mercantile Bank and against Appellant, or, in the alternative, for an order transferring this cause back to the Missouri Court of Appeals, Southern District, with instructions to reinstate its mandate, and for such other and further relief as this Supreme Court deems just and proper.

Respectfully Submitted,

FRANKE & SCHULTZ, P.C.

_____

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CERTIFICATE OF SERVICE

The undersigned counsel for the Respondent hereby certifies that on this 9th day of January, 2002, the original and ten true and correct copies of the foregoing Respondent's Subsititute Brief, together with a floppy disc containing the brief as required by Rule 84.06(g) was sent via Federal Express on the 9th day of January, 2002, for overnight delivery to the Clerk of the Supreme court of Missouri, 207 W. High Street, Jefferson City, Missouri 65101, and on this same date one copy of the brief and a copy of the disc as required by Rule 84.06(g), were deposited in the United States Mail, First Class, postage paid, addressed to:

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_____
Attorney for Respondent

CERTIFICATE REQUIRED PER RULES 84.06(c) AND 84.06(g)

Undersigned counsel for respondent hereby certifies that this Respondent's Substitute Brief complies with the requirements of Rule 55.03. Additionally, this Respondent's Substitute Brief complies with the limitations contained in Rule 84.06(b) in that it contains 9,412 words counted using Corel WordPerfect 9. Furthermore, this Respondent's Substitute Brief complies with Rule 84.06(g) in that the computer disk provided to the Court containing this Respondent's Substitute Brief has been scanned for viruses and that it is virus-free and has been formatted in Corel WordPerfect 9.

_____

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